

DECLARATION

James H. Dowdy hereby declares under penalty of
perjury that the following is true and correct based on

ATTACHMENT 4

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DEC 29 1989

Federal Communications Commission
Office of the Secretary

CROWELL & MORING

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December 29, 1989

JAN 2 3 03 PM '90
AUG 1989

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: WNCN(FM), New York, New York

Dear Ms. Searcy:

Transmitted herewith on behalf of GAF Broadcasting Company, Inc., licensee of WNCN(FM), New York, New York, are an original and five copies of an amendment to the applications (FCC Form 315, ~~WNCN 880222CC~~ and ~~FCC Form 315~~ ~~WNCN 880222CC~~ filed on March 2

AMENDMENT

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DEC 29 1989


This amendment is to the applications (FCC Form 316, BTCH-880322GF and FCC Form 316, BTCH-880322GG), filed on March 5, 1988, for authority to transfer control of GAF Corporation (GAF), a publicly-held stock company and the 100 percent owner of GAF Broadcasting Company, Inc. (GAF Broadcasting), licensee of radio station WNCN(FM), New York, New York, from the shareholders of GAF to a GAF management group led by its Chairman and Chief Executive Officer, Samuel J. Heyman. The applications were granted by Commission staff action, pursuant to delegated authority, on November 14, 1988 (FCC Ref. No. 8920-JO), and consummated on March 29, 1989 (see letter to the Commission of that date from Victor E. Ferrall, Jr., counsel for GAF Broadcasting). Ultimate control of GAF Broadcasting now resides in a privately-held stock company, also known as GAF Corporation, owned by Mr. Heyman (85% voting stock) and about 75 other employees.

A petition to deny the applications was filed by the Listeners' Guild, Inc. on March 29, 1988, and rejected by the

On December 13, 1989, following a third trial on this indictment, a Federal Court jury in the Southern District of New York returned guilty verdicts against GAF and Mr. Sherwin. The jury acquitted GAF's two subsidiaries. Two earlier trials resulted in mistrials, the first due to prosecutorial misconduct and the second after the jury advised that it was unable to reach a verdict following 12 days of deliberation. GAF and Mr. Sherwin will appeal the verdicts. This amendment is filed to inform the Commission of these latest events.

Mr. Sherwin is an officer, director and 2% shareholder of privately-held GAF Corporation. He has also been for many years an officer and director of GAF Broadcasting. His position in that regard derived from his position with the parent company. His activities have been of a supervisory nature and he has not been involved in the day-to-day operations of WNCN. Mr. Sherwin steadfastly maintains his innocence and, as indicated, intends to appeal the verdict against him. He has, however, resigned his positions with GAF Broadcasting.

Should any additional information be required by the Commission in connection with this matter, it will be promptly furnished upon request.



Samuel J. Heyman

December 28, 1989

ATTACHMENT 5

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DEC 14 1988

Before the
Federal Communications Commission
 Washington, D.C. 20554

Federal Communications Commission
 Office of the Secretary

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 In the Matter of the Application of

SAMUEL J. HEYMAN, et al., Shareholders of
 GAF CORPORATION,

For Consent to Transfer of Control of
 GAF BROADCASTING COMPANY, INC.,
 Licensee of Station WNCN (FM), New York,
 New York, to

NEWCO HOLDINGS, INC.

File No.
 BTCH-880322GF

In the Matter of the Application of

GAF BROADCASTING COMPANY,

For Consent to Pro Forma Transfer of Control
 of GAF BROADCASTING COMPANY, INC.,
 Licensee of Station WNCN (FM), New York,
 New York, to

DORSET INC.

File No.
 BTCH-880322GG

To: Chief, Mass Media Bureau

PETITION FOR RECONSIDERATION

Listeners' Guild, Inc. (the "Guild"), by its attorney, hereby respectfully petitions, pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, for reconsideration of a decision by the Chief, Mass Media Bureau, No. 8920-JO, issued November 14, 1988 (the "Decision"), granting the above-captioned applications for consent to transfer of control of GAF Broadcasting Company, Inc., licensee of station WNCN (FM), New York, New York, and denying the Guild's

B. Securities Fraud

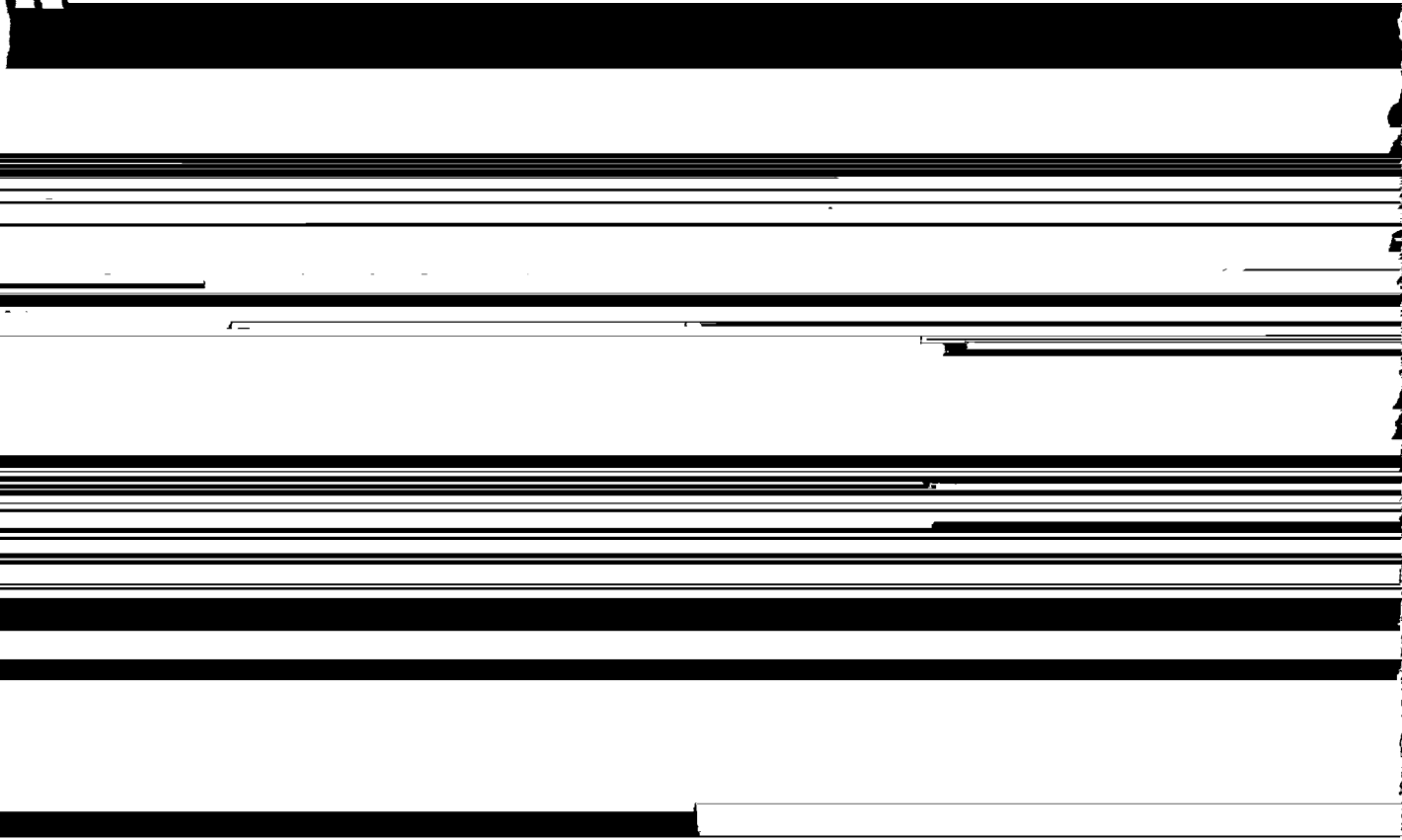
As the Decision notes¹⁹ GAF and its Vice-Chairman James T. Sherwin, who is an officer

of truthfulness and reliability which Commission policy regards as essential for fitness as a broadcast licensee.²³

III. Incompleteness and Prematurity

The *Decision* recognizes that the subject applications are not analogous to hostile takeover bids, thus rendering inappropriate GAF's request that the expedited procedures employed in such cases be used here.²⁴ It also acknowledges that the "Guild is not necessarily incorrect in characterizing the proposals now before the Commission as merely an agreement to set up a procedure which may or may not lead to an agreement to transfer control of WNCN."²⁵ Nevertheless, the *Decision* accedes to GAF's request for expedited action on the subject applications because it finds "no good reason not to do so."²⁶

As already noted, the currently ongoing trial of serious criminal charges certainly constitutes a "good reason" for avoiding unduly hasty Commission action. yet neither GAF nor



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JAN 12 1989

Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of the Application of

**SAMUEL J. HEYMAN, et al., Shareholders of
GAF CORPORATION,**

For Consent To Transfer of Control of
GAF BROADCASTING COMPANY, INC., Licensee
of Station WNCN (FM), New York, New York, to
NEWCO HOLDINGS, INC.

File No.
BTCH-880322GF

In the Matter of the Application of

GAF CORPORATION

For Consent To Pro Forma Transfer of
Control of **GAF BROADCASTING COMPANY, INC.,**
Licensee of Station WNCN (FM), New York,
New York, to

DORSET INC.

File No.
BTCH-880322GG

To: Chief, Mass Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

GAF Broadcasting Company, Inc. ("GAF Broadcasting"), GAF Corporation ("GAF"), and Samuel J. Heyman (collectively "Applicants"), by their attorneys, hereby oppose the Petition for Reconsideration filed by Listeners' Guild, Inc. (the "Guild") on December 14, 1988 ("Pet.").¹

¹

A request for extension of time until January 12 in which to file this Opposition, consented to by the Guild, was filed by GAF Broadcasting on December 23, 1988.

By letter dated November 14, 1988 ("Decision"), the Chief of the Mass Media Bureau, acting pursuant to delegated authority, approved the transfer of control of GAF to a group headed by its Chairman, Mr. Heyman, and denied the Guild's petition to deny the transfer. The transfer of control will result from a \$1.47 billion leveraged buyout of GAF, a large chemicals and building materials manufacturer, whose wholly-owned subsidiary, GAF Broadcasting, is the licensee of a single radio station, WNCN(FM) in New York City. The Guild now argues that the Commission should have designated the transfer of control applications for hearing (Pet. at 2). The Applicants disagree.

For nearly 13 years, the last five years under the leadership of Mr. Heyman, GAF Broadcasting has been the licensee of WNCN, an award-winning classical music station. For most of the 13 years, in addition to the well-known difficulties inherent in successfully operating a classical music station, WNCN has been saddled with endless, burdensome harassment by the Guild. That harassment continues here.

I. THE APPLICABLE LEGAL STANDARD

In determining whether an evidentiary hearing is required, the Commission must make a two-step analysis. First, pursuant to Section 309(d)(1) of the Communications Act, it determines whether the petition to deny contains specific allegations of fact which, if true, would show that a grant of the applications before it would be prima facie inconsistent with the public interest. It is only allegations of specific, evidentiary facts which the Commission considers in its first inquiry; "concrete factual

assertions," Gencor Inc. v. F.C.C., 832 F.2d 171, 181 (D.C. Cir. 1987), not inferences or conclusions, Columbus Broadcasting Coalition v. F.C.C., 505 F.2d 320, 324 (D.C. Cir. 1974). If this threshold test is not met, no hearing is required and the analysis is ended.

If the threshold test is met, the Commission must perform a second test, pursuant to Section 309(d)(2), determining on the basis of the applications, the pleadings filed, and other matters which the Commission may officially notice, whether a question of fact which is both substantial and material is presented. A challenge to an application based on facts contained in the application will not support a request for hearing because those facts are undisputed, not in question. United States v. F.C.C., 652 F.2d 72, 89 (D.C. Cir. 1980).

Only if the results of both tests are affirmative is an evidentiary hearing required. See generally Astroline Communications Co. v. F.C.C., ___ F.2d ___, 65 R.R.2d 538 (D.C. Cir. 1988); Citizens for Jazz on WRVR v. FCC, 775 F.2d 392 (D.C. Cir. 1985). Generally stated, in deciding whether to hold a hearing, the Commission determines whether additional facts might change the public interest conclusion supported by the information before it. Capitol Broadcasting Co. v. F.C.C., 324 F.2d 402, 405 (D.C. Cir. 1963). However, Section 309(d) requires the Commission to hold an evidentiary hearing to "look into the possible existence of a fire only when it is shown a good deal of smoke." WRVR, supra, at 397.

This is the analysis which the Commission followed here. The results are spelled out in considerable detail in its Decision.

The essential flaw in the Guild's new arguments is that, even if its few factual allegations were true, there would be no smoke.

II. THE GUILD'S CURRENT CONTENTIONS

A. Alleged Misrepresentations by GAF and Mr. Heyman Regarding WNCN's Entertainment Format

In its petition to deny, the Guild alleged the following facts: (1) In 1976, GAF had promised, in an agreement with four other parties including the Guild, to operate WNCN for five years (until 1981) with "a balanced schedule of classical music programming drawn from a wide variety of periods, styles and musical forms with particular attention to those which may not be generally available on other commercial stations in New York City at this time." (2) In 1984, GAF was headed by Mr. Heyman. (3) In 1984, GAF promised, in a settlement agreement with a competing applicant (not one of the 1976 Agreement parties), to operate WNCN "as a classical music format station for five years." (4) In 1984, WNCN began promoting its classical music format as the "Good Life," which entailed a different mix of classical music than had been offered previously.

From these allegations, the Guild concludes (1) that the two promises made by GAF in private agreements were representations to the Commission, (2) that "a classical music format" promised in 1984 must have meant the same mix of classical music being broadcast by WNCN from 1976-1981 because the 1976 description, quoted above, was "a living exemplar of the classical music format to which the parties would naturally refer at that time" (Guild, Reply, p. 4, May 19, 1988), (3) that GAF knew when promising "a

classical music format station" that the classical music mix was going to change and, therefore, (4) that GAF and Mr. Heyman "willfully deceived" the Commission.

To the extent that one can imagine an attempt to perpetrate a "willful deceit" of this nature on the Commission, which neither enforces private agreements nor regulates musical formats (let alone the mix of music within musical formats), the evidentiary facts alleged by the Guild, even were they true, on their face would not establish a deceit, willful or inadvertent. No misrepresentation was made by GAF or Mr. Heyman to the Commission or to anyone else. The Guild does not allege that WNCN is not now, or ever has not been, operated by GAF Broadcasting as "a classical music station," nor could it. Accordingly, the Section 309(d)(1) threshold test is not met by the Guild.²

The Guild further says the Commission "implicitly . . . and incorrectly" treated the Guild's petition to deny as raising a format change, rather than character, issue (Pet. at 3). This claim is simply wrong.³

²

Without in any way conceding that the Guild met its Section 309(d)(1) burden, in connection with Section 309(d)(2) it should be noted that, as a part of their opposition to the Guild's petition to deny, the Applicants submitted a detailed, one-month program schedule for WNCN showing that the station, beyond argument, continues to provide "classical music programming drawn from a wide variety of periods, styles and musical forms." (Applicants, "Opposition to Petition to Deny," Exhibit A, May 11, 1988.)

³

"Accordingly, Guild's complaint in the area of format is limited to the issue of whether the licensee's actions otherwise disqualify it on grounds of character." Decision, p. 5.

B. Alleged Age Discrimination by WNCN

The Guild concludes that in 1988 WNCN "deliberate[ly] and flagrant[ly]" violated federal and state laws proscribing age discrimination (Pet. at 5 and Ex. C, pp. 6-7). Its evidentiary fact allegation is that, while there was never any complaint of age discrimination filed with, let alone a determination made by, a state or federal agency or court, such discriminations occurred (Pet., Ex. C).

The Commission has recognized that there are certain forms of conduct not unique to broadcasting, for example, providing equal employment opportunities without regard to race or sex, which may directly affect the public interest in broadcasting and, therefore, has adopted rules or policies relating to such conduct, for example, Section 73.2080. Further, the Commission has recognized that certain conduct which it does not directly regulate may also have public interest significance, for example, the making of specific fraudulent representations to another governmental unit, and accordingly has provided that, while it will not adjudicate such matters in the first instance, it will consider final factual determinations of them by appropriate courts or agencies in evaluating licensee qualifications. Character Qualifications, 102 F.C.C.2d 1179, 1196, 1205 (1986).

The Commission's rules do require licensees to establish equal employment opportunity policies or programs, but not with respect to age discrimination. Accordingly, even if the Guild's allegation that announcers were fired by WNCN because of their age were true, absent a supporting final determination it would not

demonstrate prima facie inconsistency with the public interest. The Section 309(d)(1) threshold test is not met because there is neither (a) an alleged Commission rule or policy violation (there being no rule or policy relating to age discrimination, see Section 73.2080(a)), nor (b) an allegation of non-FCC conduct cognizable under the Character Qualifications policy statement, 102 F.C.C.2d at 1204.

The Guild contends that even if age discrimination is not covered by the FCC's rules, it should be (Pet. at 5). If the Guild is correct in this regard, it has a basis for a rulemaking request, but not for an evidentiary hearing here.⁴

C. Alleged Union Carbide Stock Price Manipulation

In a timely filed amendment to the applications, GAF disclosed that it and one of its senior executives, James Sherwin, had been indicted for alleged criminal manipulation of the price of Union Carbide stock owned by GAF to the corporation's advantage. While the Guild now argues that the Commission should have deferred decision pending either the outcome of the trial or final judicial determination (it is not clear which) (Pet. at 6), it expressly concedes that it is the Commission's policy not to con-

⁴ In its petition to deny, relying on facts set forth in the

sider criminal conduct allegations until they ripen into ultimate adjudications by an appropriate trier of fact.⁵

D. Alleged "Incompleteness and Prematurity"

Finally, in a concluding section entitled "Incompleteness and Prematurity," the Guild makes two arguments.

First, it says the Commission should not have acceded to GAF's request for expedited action, and characterizes the Commission's decision as "unduly hasty." (Pet. at 7.) The short answer is that, despite GAF's requests for expedition, the Commission did not do it. It took the Commission nearly nine months to act on the applications.⁶

⁵ 102 F.C.C.2d at 1205. The Guild asserts, without factual support, that the alleged stock manipulation involves "precisely the sort of conduct which bears directly upon the character traits of truthfulness and reliability which the Commission policy regards as essential for fitness as a broadcast licensee." (Pet. at 6-7.) While not necessary to disposing of the Guild's instant request for an evidentiary hearing, the following facts should perhaps be noted: (1) Mr. Heyman is not subject to the indictment. (2) Mr. Sherwin is not actively involved in the day-to-day operations of GAF Broadcasting. (3) The indictment alleges a single, isolated incident and not a pattern of conduct. (4) The alleged incident involves the stock of a chemicals company (Union Carbide) and has nothing to do with broadcasting, WNCN, or GAF Broadcasting. (5) The unlawful conduct alleged is stock price manipulation, not misrepresentations by GAF or Mr. Sherwin to a governmental unit. (6) It does not in any way cast a cloud on GAF's unblemished 12-year record of truthfulness with the Commission and reliability in the operation of WNCN in the public interest.

⁶ The only GAF request acceded to was that the Commission, in accordance with established practice, not wait for the final shareholder ratification vote before acting on the applications. (Decision, p. 9.) This is a sound practice since, before voting on a merger, shareholders of a widely held, public company need to know whether the merger will pass regulatory muster if they approve it.

Second, while the Guild argued unsuccessfully in its Petition to Deny, p. 12, that the "financial structure and capacity of the applicant is still undetermined," the Guild now makes a different argument with respect to Mr. Heyman's financial qualifications. The Guild now says that Mr. Heyman falsely certified his financial qualifications and that a false certification issue should be designated against him (Pet. at 7-8). This contention is based entirely on a sentence quoted from a newspaper article which is, on its face, not inconsistent with the certification given by Mr. Heyman.⁷ Indeed, the suggestion that Mr. Heyman would have gone through the massive and expensive leveraged buyout effort he has undertaken without certainty -- let alone "reasonable assurance" -- of the availability of funds to consummate, is not credible.

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The November 23, 1988, newspaper article, according to the Guild (Pet. at 8, n. 30), said that GAF Corporation said that "financing arrangements were nearly complete." The March 21, 1988, applications affirmed that Mr. Heyman and the buying group had sufficient net liquid assets on hand or available from committed sources to consummate the transaction and operate WNCN for three months, and that they had a "reasonable assurance of a present firm intention" for each loan. (Part II, section III.)

III. CONCLUSION

For all of the reasons set forth above, it is respectfully requested that the Guild's Petition for Reconsideration be denied.

Respectfully submitted,

GAF BROADCASTING COMPANY, INC.,
GAF CORPORATION, AND
SAMUEL J. HEYMAN

By: 

Victor E. Ferrall, Jr.

CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 624-2535

Their Attorneys

January 12, 1989

CERTIFICATE OF SERVICE

I hereby certify that I have, this 12th day of January, 1989,
caused a copy of the foregoing Opposition to Petition for
Reconsideration to be mailed, postage prepaid, to the following:

David M. Rice, Esq.
75-28 181st Street
Flushing, NY 11366

Counsel for The Listeners' Guild, Inc.

Alex D. Felker, Esq.*
Chief, Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W., Room 302
Washington, D.C. 20554



Claire McCardell

* Indicates copy delivered by hand.

ATTACHMENT 6

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JAN 12 1989

Federal Communications Commission
Office of the Secretary

Before the
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Washington, D.C. 20554

In the Matter of the Application of

**SAMUEL J. HEYMAN, et al., Shareholders of
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